

OGC 79-06916
27 July 1979

MEMORANDUM FOR: C/Benefits & Services Division

FROM :
Assistant General Counsel

SUBJECT : Ash Wednesday and Good Friday Religious Services

REFERENCES : A. Kramer, Speaker Sparks Protest at FCC, The Washington Post, 28 March 1978
B. Boodman, Religious Services in Pentagon Ruled Unconstitutional, The Washington Post, 27 July 1978

1. You have requested our opinion on the legal propriety of the Agency's practice of holding Ash Wednesday and Good Friday religious services in the Headquarters auditorium. You note that this inquiry is generated by referenced articles which set forth conflicting positions. In Reference A, Washington Post staff writer Larry Kramer says, "the General Counsel of the General Services Administration, which has jurisdiction over federal office space, said any meeting of a sectarian group in Federal offices is clearly forbidden by law." Conversely, in Reference B, Sandra Boodman states that Federal Magistrate Quin Elson's decision on religious services in the Pentagon indicates that religious services can be held in federal buildings if they are held out of the view of the public. Judge Elson states religious services could be conducted in a room or auditorium.

2. Your inquiry requires an examination of both constitutional and regulatory restrictions on conducting subject activities. The constitutional restrictions are created by the language of the First Amendment's Establishment Clause which states:

Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof;...

3. The United States Supreme Court has established the following tests for measuring a government action against Establishment Clause prohibitions:

(1) The action must have neither the purpose nor the primary effect of advancing religion and

(2) It must not foster an excessive entanglement with religions.

Within these guidelines various federal courts have stated that on government property the Government may depict objects with spiritual content, but may not promote or give its stamp of approval to such spiritual content. Allen v. Heckel; 1970, 424 F. 2d 944, U.S. App. D.C. In Everson v. Board of Education. 330 U.S. 1 (1946) the U.S. Supreme Court upheld the temporary use of public school facilities where the benefit received by the religious group involved negligible public expense or of administrative functions.

4. It is our understanding that very little additional expense is incurred as a result of the services held in the Agency auditorium and accordingly they would not appear to be an objectionable drain on the public treasury. I am concerned, however, about your statement that "my office arranges for Ash Wednesday and Good Friday religious services." This practice suggests a degree of control which may arguably constitute "entanglement" proscribed by the court. It would, in the undersigned's view, be less objectionable to have the Agency merely provide the appropriate space while the activities themselves are arranged by a nongovernmental association of employees. In any event, Agency administrative involvement should be reduced to the lowest possible level.

5. We must now turn to the question of whether regulatory restrictions on the use of government buildings prohibit their use for religious services, notwithstanding the absence of constitutional objection. The pertinent regulations governing the use of space in federal buildings are found at 41 C.F.R. 101-20.7. This subpart prescribes guidelines and rules to be followed by agencies in permitting the use, as meeting places, of auditoriums, conference rooms, etc., controlled for space assignment and reassignment purposes by GSA. Agency's occupying buildings which are not controlled by GSA for space assignment purposes may elect to follow the guidelines and rules prescribed by 41 C.F.R. 101-20.7.

6. This Office has generally held that the CIA has exclusive control over the internal assignment and reassignment within the Headquarters building due to our unique security requirements. We are not aware, however, of any formal written agreement between GSA and CIA acknowledging this fact. Regardless of the existence of such an agreement, the Agency, as a matter of policy and practice, has elected to conform to GSA rules and guidelines to the extent compatible with Agency activities.

7. Pertinent for our examination is Subsection 101-20.701(b) of the guidelines which provides:

(b) Except as provided in paragraph (c) of this section, agencies having exclusive use of and/or exercising authority over meeting places may permit their use for:

* * *

(3) Meetings conducted by or actively participated in by employees of the agency and approved by the head of the agency.

* * *

(5) Meetings or performances not directly related to the functions of Federal agencies or activities of employee groups when authorized by the head of the Federal agency occupying the building and controlling the use of this meeting place, and when the agency head determines that such meetings or performances would not adversely affect the interests of the Government

The paragraph (c) exceptions cited above provide that meeting places may not be used for:

(1) Meetings or performances sponsored or conducted by any organization, individual, or activity practicing or advocating discrimination based on race, creed, color, sex, or national origin.

(2) Meetings or activities having a partisan political, sectarian, or similar nature or purpose.

(3) Meetings or activities for the purpose of advocating or influencing action on legislation.

(4) Meetings or activities sponsored or conducted by or for commercial enterprises for profit-making purposes through the direct sale of articles, charging of admission fees or the making of an indirect assessment for admission, or the taking of a collection.

Subparagraph (2) is the only prohibition arguably applicable to our case, primarily due to the use of the word "sectarian." Unfortunately this term is not defined in this section nor elsewhere in the Code of Federal Regulations. Webster defines sectarian as:

1: ...relating to, or characteristic of a sect or
sectarian 2: limited in character or scope.

8. It is my understanding that the Ash Wednesday and Good Friday services are generally ecumenical in nature and not intended to promote, support or emphasize one particular religious group over another. Under such circumstances it is our opinion that the services do not fall within the definition of "sectarian" as used in section 101-20.701(c) and may be permitted if the DCI determines that the activities would not otherwise adversely affect the interest of the Government.

9. Finally, when determining the time such services should be held, you should consider the language of 20.701(e) which states:

(e) Excluding meetings to carry out the assigned functions of Federal agencies, or meetings which are determined by an appropriate official as being in the Government's interest, meeting places will not be available during official working hours of the occupant agencies except for 1 hour during the normal luncheon period.

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